(5)

No. 06-134

In the
SUPREME COURT OF THE UNITED STATES

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION

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December 29, 2006

STATEMENT OF FACTS

This Supplemental Brief in Opposition is submitted in response to the Brief for the United States as Amicus Curiae filed on December 22, 2006 ("US brief").

For the most part, the US brief treads no new ground, and consists largely of a discussion of the merits favorable to petitioners, similar to that expressed by the Government in response to the inquiry of the Circuit Court. As such, it is precisely the sort of expression of views on a question of statutory construction to which this Court referred in Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), when it stated, "While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." Id. at 702.

The US brief does not contest the applicability of the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602-1611 to the resolution of the threshold jurisdictional question, nor that the FSIA transferred the responsibility for making determinations concerning immunity from suit from the State Department to the courts. See Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The US brief does not dispute the applicability of the Vienna Convention on Diplomatic Relations, 21 U.S.T. 3227, and the Vienna Convention on Consular Relations, 21 U.S.T. 77, to the substantive issues that will eventually be presented for resolution should the litigation continue, nor does it question the principle that "[p]ure questions of statutory construction," such as that embodied in the Court of Appeals' decision here, are "well within the province of the Judiciary." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

Most significantly, the US brief does not express such an "opinion on the implications of exercising

jurisdiction over particular petitioners in connection with their alleged conduct," as Altmann suggested "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy on a case by case basis." 541 U.S. at 702. Indeed, the Government asserts no prerogatives of the Executive Branch, nor any basis for deference to it, in either this litigation or in the determination under review, and the case therefore presents no issues of Constitutional dimension.

Rather, the Government asserts nothing more than that it, and other members of the diplomatic community, await the ultimate resolution of the matter with interest as "important to our Nation's foreign relations." US brief at p. 18. As examples of that interest, the Government, at US brief, p. 19, cites speculative and nonspecific possible reactions of other nations to the outcome of this litigation. The Government thus argues that the jurisdictional question should be resolved with certainty, and it argues that a denial of certiorari in this case would fail to provide that certainty in that it would let stand a conflict between the Second Circuit and the decisions of the Third Circuit in City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985), and, to a lesser extent, the First Circuit in Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002) and the District of Columbia Circuit in McArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C.Cir. 1987).

The Government thus asserts no ground or basis for the granting of certiorari other than the apparent split in authority that petitioners contend is found in the superficial and parenthetical treatment of the subject matter in the fifteen-year-old Englewood case, which represented, at most, an early and transitional treatment of the subject matter.[1] In contrast, the Second Circuit's decision in this case is entirely consistent with the seminal D.C. Circuit

[1] See, our main Brief in Opposition at pp 11-13.

case of Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which decision placed "rights to payment of money secured by an interest in land" among rights cognizable under FSIA's immovable property exception, 535 F.2d at 1523, and which cited with approval County Board v. Government of the German Democratic Republic, Civil No. 78-293-A (E.D.Va. Sept. 6, 1978), an earlier district court case that upheld jurisdiction to determine the validity of a real estate tax lien under the immovable property exception. McArthur does not present a split in authority, because, as an action for injunctive relief brought by neighbors seeking to abate the conduct of the occupants of the property, "the Association's complaint sound[ed] not in the law of real property at all, but the law of nuisance." McArthur at 921. Nor does Fagot Rodriguez present a split in authority, since that matter was "a simple contract dispute over nonpayment of rent – without more." Fagot Rodriguez, 297 F.3d at 12.

Neither petitioners nor the Government have provided sufficient reason not to let stand the decision of the Second Circuit, which simply ruled, in accordance with the plain language of a statute that reposes jurisdiction in the courts to resolve conflicts concerning rights in immovable property in this country held by foreign sovereigns, that those property-owners and taxing entities such as the City of New York, may resolve their disputes in the Courts.

Finally, we agree with the Government that the second question posed by petitioners is not fairly presented, since the Circuit Court did not, as petitioners argue, "rely on" the international agreements in question, but only referred to them, in the phrasing of the US brief at p. 19, to "shed light" on the proper construction of the FSIA's immovable property exception.

CONCLUSION

FOR THE REASONS STATED, AND FOR THE REASONS STATED IN OUR MAIN BRIEF IN OPPOSITION, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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